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July 27, 2004

**DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS**

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: January 27, 2004

Case Number: TSO-0079

This Decision concerns the eligibility of XXXXXXXXXXXX (hereinafter referred to as "the individual") to hold an access authorization (also called a security clearance). The local DOE security office suspended the individual's clearance after determining that information in its possession created substantial doubt about the individual's continued eligibility for an access authorization under the Department of Energy (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As explained below, I have concluded that the individual's access authorization should be restored.

Background

The individual works for a contractor at a DOE facility where some assignments require an access authorization. The local DOE security office issued a Notification Letter to the individual on August 12, 2003. The Notification Letter alleges that DOE has substantial doubt about the individual's continued eligibility for a clearance, based upon disqualifying criteria set forth in section 710.8, paragraphs (k) and (l).

The Notification Letter alleges that the individual has possessed, used or experimented with an illegal substance. This charge is based on the individual's admission that he smoked marijuana at a Rolling Stones concert in 1997. The Notification Letter also alleges that the individual has engaged in unusual conduct or is subject to circumstances which tend to show that he is not honest, reliable or trustworthy; or which furnishes reason to believe that he may be subject to pressure, coercion, exploitation or duress which may cause him to act contrary to the best interests of the national security. This charge is based on the individual's admission that he violated a drug certification, which he signed in 1994, when he used marijuana while possessing a security clearance in 1997. These are the grounds for the security concerns based on section 710.8, paragraphs (k) and (l).

Because of these security concerns, the case was referred for administrative review. The individual filed a request for a hearing. The local DOE security office transmitted the individual's hearing request to the Office of Hearings and Appeals (OHA), and the OHA Director appointed me as Hearing Officer in this case. At the hearing I convened, the DOE Counsel called one witness, a personnel security specialist (who testified by telephone). The individual, who represented himself, testified on his own behalf, and called two other witnesses, who are both employed at the same DOE facility, and who are personal friends of the individual. The DOE submitted nine written exhibits. The individual submitted a written answer to the charges in the Notification Letter, and two written exhibits.

Standard of Review

The applicable DOE regulations state that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all the relevant information, favorable or unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). In resolving questions about the individual's eligibility for access authorization, I must consider the relevant factors and circumstances connected with the individual's conduct. These factors are set out in section 710.7(c):

the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledgeable participation; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the voluntariness of participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuation or recurrence; and other relevant and material factors.

A DOE administrative review proceeding under 10 C.F.R. Part 710 is authorized when the existence of derogatory information leaves unresolved questions about an individual's eligibility for access authorization. A hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). Once the DOE has presented derogatory information affecting an individual's eligibility for access authorization, the individual must come forward with evidence to convince DOE that restoring his or her access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." *See, e.g., Personnel Security Hearing, Case No. VSO-0013, 24 DOE ¶ 82,752 at 85,511 (1995), and cases cited therein.* The DOE regulations were amended in 2001 to state that any doubt regarding an individual's eligibility for access authorization shall be resolved in favor of the national security. 10 C.F.R. § 710.7(a). For the reasons discussed below, it is my opinion that the individual has resolved the concerns in the Notification Letter, and therefore his access authorization should be restored at this time.

Findings of Fact

Except as noted, the individual does not dispute the facts alleged in the Notification Letter. When the individual was first being considered for access authorization in 1994, he admitted to the DOE that he had used marijuana and other drugs recreationally during his college years. DOE Exhibit 3-2 (Transcript of April 7, 1994 Personnel Security Interview) at 18-30. The DOE resolved its security concerns about the individual's history of drug use by having him sign a "Drug Certification," in which he promised, among other things, that he would not use any drugs while he held access authorization. DOE Exhibit 2-1. With that reassurance, the DOE granted the individual a security clearance in April 1994.

In the fall of 1997 the individual attended a rock concert at which marijuana was prevalent. Marijuana cigarettes were being passed among the audience and were being smoked indiscriminately. Several times during the concert, the individual, like others in the crowd, was handed a marijuana cigarette. The expected reaction was either to pass the cigarette on to another member of the audience or to take a puff on the cigarette and then pass it on. For most of the concert, he passed the cigarettes on without partaking of any marijuana. However, over the course of the evening, he took a few puffs as he was passing the cigarettes.

This information did not come to the attention of the local security office until the individual admitted to it in a Questionnaire for National Security Position that he completed in October 2001. Responding to Question 24 of that form, the individual stated that he had used marijuana in 1997. On the basis of that response, the local security office interviewed him. During that interview the individual described the circumstances surrounding his marijuana use. DOE Exhibit 3-1 (Transcript of December 6, 2002 Personnel Security Interview) at 11-13.

In the Notification Letter the local security office states that the individual "admitted he took three puffs from a marijuana cigarette while attending a Rolling Stones concert." The individual disputes this quantification of his marijuana use, contending that he was unsure of the number of puffs he took and reckoned that it was no more than three, and possibly fewer. I have reviewed the transcript of the interview on which the local security office has relied for this number and I agree with the individual. In an attempt to assess the scope of the individual's marijuana use, the interviewer asked, "And how much did you partake in?" When the individual replied with "... a few inhalations," she asked, "A few meaning one – more than three, four?" and he replied, "Oh, no, three or less." *Id.* at 12. As the individual recognizes, the crux of the concern is the fact that he used marijuana after signing a drug certification, and not the number of puffs he took. See Individual's Request for Hearing, August 15, 2003. Nevertheless, it is important not to let the record reflect an inaccuracy as to the extent of the individual's drug use.

Testimony of the Witnesses at the Hearing

The Individual

The individual objected to the DOE's characterization of his frame of mind during the 1997 incident in which he smoked marijuana. The Notification Letter states, "he knowingly partook in the use of marijuana in 1997 *without giving it a thought*, while possessing a security clearance." (Emphasis added.) He felt that the DOE's choice of words leaves the impression that he willfully disregarded the commitment he made in his 1994 drug certification not to use drugs while holding a security clearance. In his request for a hearing, the individual wrote that he, as an occasional smoker, smoked the marijuana that passed his way without a conscious thought. He characterized the incident as "an error, a mistake, which demonstrates a lack of judgment on my part, not a willful violation [of my commitment to DOE]."

At the hearing the individual fleshed out this objection. He explained that he was not particularly interested in or tempted to smoke marijuana, but handling marijuana cigarettes was "just something I dealt with when attending live music performances." Tr. at 29-30. He continued,

Although it made sense at the time, in retrospect, I see the problem with this. Because most certainly if I had not handled the substance in 1997, I would not have ended up consuming it. What happened in that incident was that someone handed me a marijuana cigarette, and I ended up taking it and holding it while watching the concert, failing to pass it on, probably because my attention was fixed on the concert, and at some point, having the cigarette in my hand, I reflexively smoked it, while staring at the performance going on in front of me--some only tens of feet in front of me. Reflexively in the same sense that I would tend to sip on a cup of coffee, though I'm not consciously thinking that I should take a drink of coffee at any particular time.

Smoking is not unusual for me. I have smoked tobacco in the past, and indeed, I currently keep a humidor of cigars at my house. . . . I can honestly say that I did not at any tim[e] knowingly violate the law or my commitment to DOE. I never intended to use the illegal drug. I became aware of the action only after it was taking place, and I stopped.

Id. at 30-31.

In addition to demonstrating that his marijuana use was reflexive rather than intentional, the individual also contended that it was an isolated incident and will not happen again. He testified that he held and passed marijuana cigarettes at numerous live rock concerts without smoking them. *Id.* at 29. He also stated that he has been required to take several drug screenings during his career at the DOE facility, and has passed each one. *Id.* at 31-32. During part of that time, he held a position that required him to be part of the

Personnel Security Assurance Program (PSAP), which demands frequent urine tests of its participants. *Id.* at 32. He also testified as to his commitment that he will not use marijuana in the future. The 1997 incident demonstrated to the individual that he is “susceptible to the described reflexive behavior.” *Id.* at 32. As a result, for the past seven years since 1997, he has avoided placing himself in situations where he will be around illegal drugs. *Id.* at 32, 36. He stated that he has attended only a few live music performances since the 1997 concert, and he has not handled any illegal drugs since then, let alone used any. *Id.* at 32, 38. Those live performances that he does attend are held indoors, where smoking of any kind is prohibited. *Id.* at 38. He no longer attends concerts at venues where smoking is permitted. *Id.*

The individual also provided testimony in favor of his honesty, reliability, and trustworthiness. He stated that he reported his 1997 marijuana use in what he believed to be the proper manner, on a Questionnaire for National Security Position (QNSP) that he completed in October 2001. *Id.* at 31. He submitted into evidence a pamphlet produced by his employer entitled, “DOE Reporting Requirements,” which enumerates an employee’s responsibilities to inform the DOE if specified actions occur, such as arrests, garnishments, inappropriate disclosures of classified information, treatment for substance abuse or mental illness, contacts with foreign nationals, waste, fraud, abuse or other wrongdoings. As the individual attested, the pamphlet did not require the individual to report the 1997 incident. *Id.* at 69. Therefore, he reported the incident properly when he disclosed it for the first time on the QNSP, which specifically asked for information of that type. He also contended that the fact that he reported the incident properly “supports my argument that I have sufficient honesty, integrity and trustworthiness not to present a security risk.” *Id.* at 31.

The Individual’s Co-worker and Friend

One witness testified as both a co-worker and a friend, who knows the individual very well. *Id.* at 49. They work together daily and share the responsibility for a number of tasks at the facility. *Id.* at 52. They also interact socially on the weekends. *Id.* at 55. He testified that he has not seen the individual use drugs, that such behavior would surprise him, and that he sees the individual frequently enough that he would know if he is using drugs. *Id.* at 54-56. He also expressed his opinion that the individual’s trustworthiness and integrity are of the highest order. *Id.* at 58.

The Individual’s Manager

The individual also called as a witness his current manager, whom he also knows on a social level. She interacts with the individual on the average of three times a week at work, and twice a month socially. *Id.* at 64. She testified that, based on her personal experience with others suffering from alcohol problems, she feels that the individual did not have a problem with drugs and has not used them except for during the 1997 incident. *Id.* at 63, 65, 67. To the contrary, she testified that the individual is honest, trustworthy and reliable. *Id.* at 63. She described the 1997 incident as isolated and “a single instance of bad judgment.” *Id.* at 64. She also pointed out that he “did self-report the incident, and

I think he's trying to do the right thing." *Id.* When asked why she believes he will not suffer another similar lapse of judgment, the manager responded,

. . . I think that [he] has really learned his lesson from this. This has been a great stress in his life to lose his clearance. It has been – I think [he] feels that he has let down people, that he's let down his co-workers. I think he feels like he's let down me as his manager. So I think that he has really learned his lesson and would never make this mistake again.

Id. at 66.

The Personnel Security Specialist

The DOE Counsel called a personnel security specialist, who testified about the nexus between the individual's use of marijuana in 1997 and the stated security concerns under Criteria K and L. She stated that "[w]hen a person is under the influence of an illegal substance, there is an increased risk of unauthorized disclosure of classified information." *Id.* at 13. This constitutes the DOE's concern under Criterion K. The individual's use of marijuana after signing a drug certification, in which he acknowledged that he would not use illegal drugs and understood that he could lose his access authorization if he did, raises an additional concern under Criterion L. *Id.* at 12. This concern rests on conduct that demonstrates a lack of judgment, trustworthiness, or unwillingness to comply with rules, in this case, the terms of the drug certification. *Id.* at 13. The personnel security specialist maintained that the individual broke a law by smoking marijuana, *id.* at 19, and the passing of time since the individual broke his commitment to the DOE to not use drugs does little to mitigate the DOE's concern about his trustworthiness. *Id.* at 21-22. Finally, although she stated that the individual's failure to report his marijuana use contemporaneously raises a concern, the personnel security specialist testified that his honesty was not at issue, because he did report the incident on his QNSP, *id.* at 15. She testified that the individual was under no obligation to report his drug use before he completed the QNSP. *Id.* at 16, 22.

Analysis

Illegal drug use raises serious doubts about an individual's eligibility for access authorization because, as the personnel security specialist stated, an individual under the influence of an illegal substance may unknowingly reveal classified information. Willful illegal drug use presents an additional concern in that an individual who is willing to disregard a law that forbids such action may also be willing to disregard laws that protect classified information from disclosure. This same concern arises when an individual uses illegal drugs after signing a Security Acknowledgment that informed him that he could lose his access authorization for involvement with illegal drugs, as do doubts about the individual's honesty, reliability and trustworthiness. Based on the record before me, I find that the DOE properly invoked Criteria K and L when it suspended the individual's security clearance.

I next consider whether the individual has mitigated the concerns about his marijuana use. Of the factors that the regulations at 10 C.F.R. § 710.7(c) deem that I must consider in rendering my decision, the most relevant are the nature and extent of the individual's marijuana use, the voluntariness of the use and his knowledgeable participation, and its frequency and recency. There is no evidence that the individual has used marijuana in the past ten years at any time other than the 1997 incident he self-reported on his 2001 QNSP. A series of negative drug tests supports the individual's contention that he has not used any illegal drugs since the incident. Moreover, as the individual and his manager both testified, the fact that he self-reported the incident, under circumstances in which it was highly unlikely that the DOE would have otherwise learned about the incident, tends to show that he is honest in representing that this incident constitutes the full extent of his recent marijuana use. Tr. at 31, 66 (testimony of manager, "I can't think of why someone would self-report one incident but not another"). Based on the record, I am convinced that the individual's extent of "recent" marijuana use is limited to the 1997 incident. The testimony of his witnesses demonstrated that, to their knowledge, it is not in his nature to use marijuana or any other illegal drugs. Finally, the personnel security specialist testified that the DOE's concern about illegal drug use diminishes over time. *Id.* at 20. Because the individual's illegal drug use occurred only one time, seven years ago, under circumstances in which the individual has taken pains not to replicate, the individual has mitigated the DOE's security concern under Criterion K.

I also find that the individual has successfully mitigated the DOE's security concerns under Criterion L. The DOE Counsel represented that the DOE's only factual basis for its Criterion L concerns was the individual's violation of his drug certification when he used marijuana in the 1997 incident. *Id.* at 74. Although the personnel security specialist testified that the DOE's concern under Criterion L does not diminish over time, *id.* at 21-22, I take issue with her position. It is true that an individual must be held to the terms of the agreement, for example, his commitment not to use illegal drugs for as long as he holds access authorization. Nevertheless, I must still consider the fact that the only time he broke that commitment is now seven years in the past, and there is no evidence that he has engaged in any other transgressions of the drug certification since that incident. Moreover, given the circumstances under which he broke his promise to the DOE, his self-reporting of the incident, and the favorable testimony I heard at the hearing, I find that his behavior during the 1997 incident no longer raises sufficient doubt as to his eligibility for access authorization.

Conclusion

Based on the record in this proceeding, I find that the individual has resolved the security concerns under 10 CFR § 710.8(k) and (l) that were specified in the Notification Letter. For the reasons explained in this Decision, I find the individual has shown that restoring his access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. Accordingly, it is my decision that the

individual's access authorization should be restored. Either party may seek review of this Decision by an Appeal Panel under the regulation set forth at 10 C.F.R. § 710.28.

William M. Schwartz
Hearing Officer
Office of Hearings and Appeals

Date: July 27, 2004